IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1100 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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THAKORE MANGAJI SARDARJI & 3 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
Mr.P.K.Jani and Mr.Y.M.Thakore appearing for Mr.JAL SOLI UNWALA for Appellant(s) : 1 - 4.
MR.P.D.BHATE, ADDL.PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE
and
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 23-26/06/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

The appellants came to be tried by the learned Additional Sessions Judge, Mehsana camping at Patan in Sessions Case No.138 of 1996. They came to be convicted

for the offences punishable under Sections 302 read with Section 34 of the Indian Penal Code and were sentenced to undergo life imprisonment and to pay of Rs.500/- each, in default of which, to undergo rigorous imprisonment for three months by the learned Additional Sessions Judge, Mehsana camping at Patan by judgment and order dated 19/9/1997 passed in Sessions Case No.138 of 1996.

2. As per the prosecution case, while deceased-Talsangji Vakhatsang Thakor, was returning alongwith Hargovan Ganeshbhai, Mohtaji Kanaji, etc. in auto-rickshaw on 12/2/1976 at about 7:30 p.m., the rickshaw was intercepted by the appellants near Laxmipara Cross Road. The appellants were armed with deadly weapons like sword, dharia, battleaxe (Farsi), etc. Deceased-Talsangji was done to death by indiscriminate and deadly assault by the appellants. Hargovan Ganesh, Mohtaji and one Bhagubhai, who were present at the place of incident, were allegedly intimidated by the appellants and, they therefore, escaped in the auto rickshaw from the place of incident. Hargovan Ganesh informed Ramsangji-son of the deceased Talsangji about the incident. They both came to the spot and noticed that the deceased had succumbed to the injuries. They went to the Police Station and, lodged the F.I.R. On basis of the F.I.R., an offence was

registered and investigated. The Investigating Agency having found sufficient material against the appellants, filed charge-sheet against them in the Magisterial Court. Since, the case was triable exclusively by the Court of Sessions, the case was committed by learned Magistrate to the Sessions Court and Sessions Case No.138 of 1996 came to be registered.

2.1 Charge against the appellants-accused was framed at Exh.2. The appellants pleaded not guilty to the charge and claimed to be tried.

3. The prosecution evidence was recorded. The prosecution examined first informant-Ramsangji Talsangji and eye-witnesses Hargovan Ganesh and Mohtaji Kanaji besides other witnesses. The prosecution also led documentary evidence. The defence claimed that the accused persons were falsely implicated and accused No.4 took an additional plea of alibi and led evidence in support thereto.

3.1 Learned Additional Sessions Judge took into consideration the evidence led by the prosecution, as well as, defence and concluded that the prosecution was successful in establishing charges levelled against the

appellants and that the defence version is not acceptable. The trial Court, therefore, recorded conviction and sentenced the appellants as narrated above.

3.2 Aggrieved by the said judgment and order, the appellants have preferred this appeal.

4. It appears from the record that appellant No.2 herein, Thakore Ajmalji Hariji had also preferred Criminal Appeal No.1080 of 1997 through Jail, which has been disposed of.

5. We have heard learned Advocate, Mr.P.K.Jani and Mr.Y.M.Thakore appearing for Mr.Unwala, for the appellants, so also, learned A.P.P., Mr.Bhate for State.

6. We have been taken through the record and proceedings by learned Advocate, for the appellants, as well as, by learned A.P.P., during the course of their respective submissions. We have also gone through the judgment and order impugned in the appeal.

7. It is contended by learned Advocate for the appellants that the trial Court has committed an error in

accepting the prosecution case and convicting the appellants. It was submitted that it cannot be disputed that the deceased met with an homicidal death, but the appellants are falsely implicated. Their involvement alleged by the prosecution is not properly established and the trial Court has erred in convicting the appellants.

8. Assailing the judgment impugned in the appeal, it was submitted that appellant No.4 has taken a plea of alibi and has adduced evidence in support of that plea by examining witnesses, which is not accepted by the trial Court. It was submitted that the defence is not expected to establish its defence to the hilt unlike prosecution.

8.1 It was submitted that the investigation is not properly and independently carried out. The alleged discovery is alleged to have been made in presence of Panch Witnesses and a joint discovery Panchnama is drawn. Drawing of joint discovery Panchnama has been deprecated by the Apex Court in various judgments and trial Court ought not to have accepted the evidence emerging therefrom. It is also contended that admittedly the incident occurred in dark and, therefore the identity of the assailants and the allegation that the appellants

were the assailants, rolls under a cloud of doubt. It is submitted that no test identification parade is conducted. None of the eye-witnesses have tried to rescue the deceased and they have gone away from the place. Their conduct is, therefore, not natural. It was also submitted that the first informant, who is the son of the deceased, upon knowing about the incident, goes to the place where the deceased was lying, rather than informing the Police. Likewise, after reaching the place of incident and learning about the death of the deceased, the first informant straightway goes to the Police, rather than informing the relatives. This conduct on part of the first informant is very unnatural and his deposition may be examined from that perspective.

8.2 It was submitted that the medical evidence does not corroborate the evidence of the eye-witnesses. On the contrary, the evidence raises doubt about the reliability of the evidence of the eye-witnesses. It was submitted that admittedly the doctor has stated that some of the injuries were possible with hard and blunt substance. As against that the weapons which were allegedly used by the appellants were sharp edged weapons. The doctor has also admitted that more than 4 (four) persons could have inflicted the injuries, and

therefore, the version of the eye-witnesses does not get support from the medical evidence. The version of the eye-witnesses therefore, ought to have been rejected by the trial Court.

8.3 It was also contended that there is discrepancy as to the time, when statement of Kanaji was recorded. Kanaji himself and the other witnesses give different time about the incident.

8.4 It was submitted that as per prosecution case, the deceased was firstly assaulted upon, while he was sitting in the rickshaw and several injuries were caused. But, no investigation in the direction as to whether there were blood marks in the auto-rickshaw or not has been carried out. No evidence in this regard has come forward. It was also submitted that there is discrepancy about the place of incident as emerging from deposition of Prosecution Witness Nos.2, 3 and 10. The trial Court has also not examined the evidence from viewpoint of the defence that, the deceased was himself a headstrong person and was involved in number of offence and have many enemies who could have done him to death.

8.5 It was submitted that Hargovan Ganesh, who

claims to be an eye-witness has admitted that, he did not know Mohtaji. He has given description of Mohtaji as man with turban and Dhoti. The first informant who is not an eye-witness has in his first information specifically given name of Mohtaji. How this has happened is not explained by the prosecution. It was also submitted that the prosecution case suffers from a series of lacuna; the cumulative effect of which should have resulted into acquittal of the appellants rather than conviction.

8.6 It was also contended that the version of the eye-witnesses that they saw the incident and while doing so identified the weapons could not have been accepted by the trial Court. When the incident occurred, admittedly, it was dark and they could have identified the weapons in light of an auto-rickshaw which runs on Magneto and not on battery. It would therefore not give sufficient light continuously. Added to this is the factor that, the weapons were rusted when they were shown to the witnesses in Court and, therefore also, they could not have identified. The trial Court has committed an error in accepting this evidence.

8.7 It was also submitted by learned Advocate for the appellants that the postmortem report indicates that

stomach of the deceased was empty. Whereas, it has come in the evidence that the deceased had taken a tea at the house of Kanaji Hariji, to whose place they had gone for collecting fodder.

9. It was therefore argued by learned Advocate for the appellants that, the appeal may be accepted and the appellants be set at liberty by accepting this appeal.

10. Learned A.P.P., Mr.Bhate, has opposed this appeal.

10.1 According to him, the appellants' involvement is proved by the prosecution through eye-witnesses, Hargovan Ganesh and Mohtaji Kanaji, whose version gets support from evidence of Kanaji Hariji, Ramsangji Talsangji and other witnesses.

10.2 Mr.Bhate, submitted that the appellants appear to have assaulted the deceased in a preplanned manner. All of them had deadly weapons, all of them used these deadly weapons in an indiscriminate manner. There are eye-witnesses to the incident, who in terms involve the appellants and, therefore, the trial Court has rightly recorded the conviction.

10.3 It was contended that there may be some contradictions or inconsistencies in the prosecution case but, none of these contradictions or inconsistencies is major or strong enough to abrogate the effect of the other evidence led by the prosecution. It was also contended that the appellants and eye-witnesses knew each other and therefore, for rural persons like the eye-witnesses identifying the assailants even in lesser light would not be an impossibility. The contradictions or discrepancies are minor in nature and, therefore, the Court may not interfere with the judgment and order impugned herein and may dismiss the appeal.

11. Both the sides have placed reliance on certain judgments, which will be discussed in the paragraphs to follow.

12. We have closely scrutinized the medical evidence in form of deposition of Dr.Arvind Hargovandash, Exh.10 and postmortem notes Exh.12.

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13. Since there is no agitation on the aspect that

the death of the deceased was homicidal, we do not propose to deal with that aspect in detail. But, we notice from medical evidence that the deceased had as many as 17 external injuries, which included incise wounds, bruise, haematoma wound, stabbed wounds and lacerated wounds. The injuries were found on various parts of the body including vital portions like head. The death is certified to have occurred by neurogenic and hemorrhagic shock due to injuries over the head causing fracture of skull and trauma to the brain substance. Therefore, the death of the deceased being homicidal has rightly been concluded by the trial Court.

13.1 It was also contended that as per the prosecution case all the assailants were armed with sharp edged weapons like sword, battleaxe and dharia. Against that the doctor has opined that injuries No.7, 10, 11 and 17 were in form of bruise or contused lacerated wounds and were possible with hard and blunt substance. It was therefore argued that, these injuries were not attributable to any of the accused, meaning thereby that there were some other assailants, who were armed with hard and blunt weapons and therefore, the evidence of eye-witnesses does not get support from this medical evidence. Their presence at the time and place of

occurrence is doubtful. That evidence therefore, also, would be rendered doubtful.

13.1.1 However, we notice that doctor in his examination in chief has stated that injuries No.7, 12, 11 and 17 were possible with the handle of a dharia or a battleaxe. In cross-examination also, he sticks to his version. He admits a suggestion that injury No.10 was possible with a stick or with a weapon like stick. We notice that during cross-examination, a suggestion was put and was accepted by the doctor that injuries No.7, 12, 11 and 17 were possible, if the blow is wielded with force.

13.1.2 In our opinion, the contention on behalf of the defence is not possible to be accepted. There is consistent version of the eye-witnesses that the appellants indiscriminately attacked the deceased with their weapons. Obviously, in such an act, it is not unlikely that, some of the blows may have fallen on the body of the deceased with the handle of the weapon used viz. dharia or battleaxe. It is the say of the eye-witnesses that auto-rickshaw was stopped by the appellants, they were armed with weapons like sword, dharia and battleaxe and, they assaulted the deceased

with those weapons indiscriminately. There is no reason for us to doubt the version of the eye-witnesses and, therefore, in our opinion, the medical evidence that injuries No.7, 10, 11 and 17 were possible with hard and blunt substance and were possible with the handles' of dharia or battleaxe, lends corroboration to the version of the eye-witnesses rather than falsifying the same.

13.2 It was also contended that some of the external injuries were in form of stab wounds and none of the appellants was armed with a weapon, which may cause such an injury and therefore, these injuries were also possible by somebody other than the appellants which would render the version of the eye-witnesses doubtful or unreliable. In this regard also, if we examine the medical evidence, the doctor has, in terms, opined that these injuries were possible with the beak of dharia. We also notice that the stab wounds were not very deep and therefore, the opinion of the doctor that they were possible by beak of dharia, is also supported by evidence of eye-witness, who says that the appellants used dharia in indiscriminate manner.

14. The number of injuries, the site of injuries and their nature clearly indicate that the assailants were

determined to leave no chance for the deceased to survive. The incident of assault would therefore fall within the definition of murder.

15. The evidence of Prosecution Witness No.9-Hargovan Ganesh at Exh.27, if perused, clearly indicates involvement of the appellants in the incident and shows their active participation in the incident. The appellants were armed with deadly weapons like dharia, sword and battleaxe. They all were waiting, on the intersection with these weapons. They stopped the rickshaw and assaulted the deceased pulling him out of the rickshaw, they intimidated the eye-witness who, out of fear left the place and witnessed the incident from a little distance. The evidence of this witness is sought to be assailed on the ground that, he, in his statement and deposition, reveals that a person wearing a turban had accompanied the deceased to the place of Kanaji Hariji for fodder. He does not give name of that person. However, the first information given by Ramsangji, son of the deceased-Talsangji, reveals name of Mohtaji. Ramsangji is not an eye-witness. He has lodged the F.I.R. on the information received by him through Hargovan Ganesh and, if Hargovan Ganesh does not know name of Mohtaji, how could Ramsangji have given name of

Mohtaji in the F.I.R. and, therefore, the evidence of Hargovan Ganesh is not reliable, is the argument. In our opinion, evidence of this witness cannot be thrown away only on this count when presence of this witness is shown in evidence of Mohtaji as a rickshaw driver. Kanaji Hariji (P.W.No.12) also supports the prosecution case and speaks of presence of rickshaw driver. The fact that the witness-Hargovan is a rickshaw driver is not under challenge.

15.1 Evidence of Mohtaji (Exh.28), if perused, supports the version given by Hargovan. Both these witnesses in term implicate all the 4(four) appellants in the incident and say that they assaulted the deceased with their weapons indiscriminately. They also speak of the appellants having intimidated them.

15.2 Evidence of Kanaji Hariji (Exh.30) in cross-examination indicates that when Police went to Kanaji, rickshaw driver Hargovan was with them. Evidence of Kanaji also indicates that the deceased in company with three persons including rickshaw driver had gone to the place of Kanaji in search of fodder. He says that he had offered tea to them and Talsangji had taken only a sip of tea to avoid bed omen, as he was not taking tea

regularly.

16. In our opinion, therefore, the evidence of Hargovan Ganesh (Exh.27), Mohtaji Kanaji (Exh.28) is unassailable on any of the grounds raised on behalf of the appellants.

17. It is true that the prosecution has not produced case diary before the trial Court, has conducted a joint discovery Panchnama and, has not made any investigation on existence or non-existence of blood marks in the auto-rickshaw. But, the effect of this laxity in investigation will not go to the root of the prosecution and will not abrogate the effect of the evidence of eye-witnesses which gets support and corroboration from the medical evidence.

18. A contention was raised that the incident could not have been witnessed by the eye-witnesses, as it was dark. To show that it was dark, reliance is placed on evidence of prosecution witness No.9, who says that he saw the incident in light of the auto-rickshaw. He identified the weapons in that light and because the rickshaw light was on, it must be inferred that it was dark. The incident has occurred in the month of February

at about 7:30 p.m. and, it is quite right that there may be darkness at the place, but, we cannot overlook the fact that the witnesses are villagers, who are used to live in such condition unlike urbanites. It is also a fact that the eye-witnesses knew the assailants prior to the incident. It is also a fact that they were at very close quarters and were intimidated by the appellants. Thereafter, they went away and saw the incident from a little distance. Persons can be recognized not only by face, but also, by their voice, their gait, their stature, their bearing, etc. and therefore, there is no reason to doubt the version of the eye-witnesses of having seen the incident and identified the assailants as the appellants.

18.1 The contention that test identification parade has not been conducted is of no virtue to the appellants' case. When eye-witness know the appellants before the incident and give their names, there is no need to conduct a test identification parade.

19. It was also contended that the postmortem indicate that the stomach of the deceased was empty. Whereas, there is evidence to show that he had taken a tea before the incident at the house of Kanaji. In this

regard, if we examine record, there is evidence to show that deceased had taken only a sip of tea to defeat bed omen. It was argued that this was only an afterthought, because this aspect of the deceased having taken only a sip of tea is emerging only in deposition. Rustic villagers do not understand the importance of such minute details and unless asked, may not give such details. If such information is not elicited by putting specific questions, they may not reveal the same. That by itself would not render their deposition unbelievable nor would it render the prosecution case unbelievable.

20. A contention was raised that the evidence regarding place of incident is inconsistent. Our attention was drawn to depositions of Prosecution Witnesses No.2, 3 and 10. Prosecution Witness No.10 says that the incident occurred near the board of Bajpara and Laxmipara. Prosecution Witness Nos.13 and 10 says that the incident occurred near the cross road of Laxmipara and Abadpara. We may in this regard refer to Exh.49, which is the deposition of Natvarlal Babulal Patel. He is the Revenue Circle Officer, who had prepared the map of the place of incident and has shown the place of incident in the map. He has not been cross-examined and there is no challenge about the place of incident.

Similarly, a perusal of the map indicates that the place of incident is on cross-road, on one side of which is Laxmipara. It is also found from the Panchnama of the place of the incident that the place of the incident is in the outskirts of village Abadpara. Therefore, it cannot be said that there is inconsistency in the prosecution evidence regarding place of incident.

21. Learned Advocate for the appellants relied upon the decision in case of ***Ramanbhai Nanjibhai Parmar Vs. State of Gujarat, reported in 2000 (3) G.L.H. 751.*** It was observed that, *oral version of eye-witness did not get corroboration from medical evidence, there were exaggerations in the depositions and that the postmortem report was contrary, that there was no reference of knife in the F.I.R. and the first informant tried to improve version as to use of muddamal knife. It was held that prosecution case was not trustworthy.* In the case before us, it cannot be said that the version of the eye-witness does not get corroboration from the medical evidence, that their presence at the place of incident is doubtful or that they have exaggerated or improved upon their original case. Therefore, this decision cannot be of any help to the appellants.

22. Reliance was also placed in case of ***State of Gujarat Vs. Manubhai Premsangji Jadeja & Ors., reported in 1999 (3) G.L.R. Vol.40 at Page No.2613.*** In that case, there was a joint discovery of weapon by a single Panchnama and the said practice was not appreciated by the Division Bench. It was observed that *practice of joint exercise of discovery and preparing a joint panchnama of discovery in respect of incriminating material admissible under Section 27 where more than one accused is involved, is not only inexpedient, unhealthy, but at time confusing and prejudicing the interest of both the parties.*

22.1 We are in agreement with the principles laid down in the said decision. We also endorse the said view, which would be applicable in facts of the present case. We are of the view that learned trial Judge erred in accepting the discovery Panchnama. At the same time, we are of the view that, even if, we ignore the evidence in form of discovery of weapon, the evidence led by the prosecution is strong enough to connect the appellants with the crime. Discovery Panchnama would show or prove the authorship of the act of concealment of the weapon allegedly used in the crime, but non-existence of such discovery may not be of any relevance in case like the

one on hand, where there are eye-witnesses, who remain unshaken when tested on touchstone of cross-examination.

23. The foregoing discussion makes it clear that the conviction recorded by the trial Court is correct, though the trial Court committed an error in relying on discovery Panchnama also. There is consistent and unshaken evidence of eye-witnesses supported by medical evidence to uphold the conviction recorded by the trial Court. We, therefore, do not find any merits in the appeal. Appeal must fail and stands dismissed. The judgment and order of the learned Additional Sessions Judge, Mehsana camping at Patan dated 19/9/1997 passed in Sessions Case No.138 of 1996 is confirmed.

(A.L.DAVE, J.)

(BANKIM.N.MEHTA, J.)

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